No. 86-264

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JOHN ALFARONE, JOSEPH GIORDANO, and BRIAN GORDON, as Trustees of the Tapers Industry Insurance Fund and of the Tapers Industry Annuity Fund, DANIEL JONES individually and as a participant in the Tapers Industry Insurance and Annuity Funds, and on behalf of all other persons who are, will be, or have at any time since July 1, 1980 been participants or beneficiaries in the said funds, similarly situated, and UNION APPOINTED TRUSTEES OF THE TAPERS INDUSTRY INSURANCE AND ANNUITY FUNDS,

Petitioners,

—against—

BERNIE WOLFF CONSTRUCTION CORP., EMPLOYER TRUSTEES OF THE TAPERS INDUSTRY INSURANCE AND ANNUITY FUNDS, COMPONENT ASSEMBLY INC., NATASI-WHITE, INC., CIRCLE INDUSTRIES CORP., AND QUICK-WAY FINISHERS, INC.,

Respondents.

BRIEF OF RESPONDENT BERNIE WOLFF CONSTRUCTION CORP. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Questions Presented.

1. Whether ERISA* repeals the LMRA** equal representation rule to permit individual union-appointed trustees of a union employee benefit trust fund to sue in violation of the terms of the trust.

2. Whether an individual union member can bring a derivative ERISA suit on the claim that the employer-appointed trustees breached their fiduciary duty by disagreeing with the union-appointed trustees.

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* Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001 et seq.

** The Labor Management Relations Act of 1947, 29 U.S.C. §§ 141 et seq.

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Statutes Involved.

Employment Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001 et seq. ("ERISA"):

ERISA § 3, 29 U.S.C. § 1002
ERISA § 402, 29 U.S.C. § 1102
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ERISA § 405, 29 U.S.C. § 1105
ERISA § 502, 29 U.S.C. § 1132
ERISA § 514, 29 U.S.C. § 1144
ERISA § 515, 29 U.S.C. § 1145

Labor Management Relations (Taft-Hartley) Act of 1947, 29 U.S.C. § 141 et seq. ("LMRA"):

LMRA § 302, 29 U.S.C. § 186

The pertinent provisions are set forth in the Statutory Appendix.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

JOHN ALFARONE, JOSEPH GIORDANO, and BRIAN GORDON, as Trustees of the Tapers Industry Insurance Fund and of the Tapers Industry Annuity Fund, DANIEL JONES individually and as a participant in the Tapers Industry Insurance and Annuity Funds, and on behalf of all other persons who are, will be, or have at any time since July 1, 1980 been participants or beneficiaries in the said funds, similarly situated, and UNION APPOINTED TRUSTEES OF THE TAPERS INDUSTRY INSURANCE AND ANNUITY FUNDS,

Petitioners,

-against-

BERNIE WOLFF CONSTRUCTION CORP., EMPLOYER TRUSTEES OF THE TAPERS INDUSTRY INSURANCE AND ANNUITY FUNDS, COMPONENT ASSEMBLY INC., NASTASI-WHITE, INC., CIRCLE INDUSTRIES CORP., AND QUICK-WAY FINISHERS INC.,

Respondents.

BRIEF OF RESPONDENT BERNIE WOLFF CONSTRUCTION CORP. IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Statement of the Case.

This purported ERISA[1] suit is really a tactic in a long-standing jurisdictional dispute between two unions (A5-6, 12, 17-18):[2] the Dry Wall Tapers and Pointers of Greater New York Local 1974 ("Local 1974") and the Operative Plasterers' and Cement Masons International Association, Local 530 ("Local 530").[3]

The three union-appointed trustees of the Local 1974 annuity and pension

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[1] Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. §§ 1001 et seq. and particularly Section 515, 29 U.S.C. § 1145.

[2] References preceded by the letter "A" are to the pages of the Appendix to the Petition for Certiorari.

[3] See Drywall Tapers & Pointers of Greater New York, Local 1974 v. Operative Plasterers' & Cement Masons' International Association, 601 F.2d 675 (2d Cir. 1979), cert. denied, 444 U.S. 1073 (1980) for the prior history of this persistent dispute.

funds (the "Local 1974 Funds") wanted to sue various employers under ERISA to compel benefit contributions to the Local 1974 Funds (and impose statutory penalties) on account of work done by Local 530 members. A 5-6, 12, 17.

The three employer-appointed trustees did not agree. The union trustees sued the employers anyway and named the employer trustees as defendants.

The United States District Court for the Eastern District of New York dismissed for lack of standing. The LMRA equal representation rule[4] and the Local 1974 Funds' trust agreements both

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[4] The Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. §§ 141 et seq., and particularly Section 302(c)(5), 29 U.S.C. § 186(c)(5). The "equal representation rule" requires joint administration of union trust funds by equal numbers of employer and union-appointed trustees and prescribes the arbitration of any deadlocks. Id.

required the Local 1974 Funds to act only through a majority of the six trustees or, in the event of deadlock, an arbitrator's decision. Without such a consensus or a decision the trustees had no standing. Judge Nickerson also held that there were no benefit contributions due since no wages had been earned by Local 1974 members. A 15-23.

Then, the union trustees sought to realign the employer trustees as plaintiffs to cure the standing problem. They also brought forth a union member, Jones, to intervene as a class action and derivative plaintiff to carry the union's position. The District Court refused realignment and intervention. And, in one case, it dismissed Jones' separate complaint. A 11, 13, 14, 15.

The Decision Below and the Present Petition.

The United States Court of Appeals for the Second Circuit affirmed and denied rehearing. A 1-9, 10.

Without the approval of a majority of the trustees or of an arbitrator after deadlock, the union trustees had no standing to sue under ERISA or otherwise. Both the LMRA and the trust agreements forbid unilateral trustee action. And ERISA did "not abrogate the equal representation mandates" of the LMRA and the trusts. A 8.

The union-interwenor, Jones, also lacked ERISA standing. He did not seek personal benefits or injunctive relief, and so had no direct right of action. He had no derivative standing either. The employer trustees' refusal to sue did not amount to the proven fiduciary

breach required as the prerequisite to ERISA derivative litigation by Struble v. New Jersey Brewery Employees' Welfare Trust Fund, 732 F.2d 325 (3rd Cir. 1984). A 8-9.

The union trustees and their proposed intervenor now seek a writ of certiorari urging that the decision below conflicts with the Congressional intent behind ERISA and the decisions of other circuits.

Summary of Argument.

It is respectfully submitted that ERISA did not repeal the LMRA equal representation rule to permit individual trustees to sue alone in violation of the terms of their trusts. Nor has ERISA or any circuit empowered an individual fund participant to sue derivatively merely by claiming that the em-

ployer trustees have breached fiduciary duties simply by disagreeing with union trustees. That would repeal the LMRA equal representation rule.

There is no conflict in the circuits. There has been no frustration of Congressional intent.

Argument.

1. The decision below serves the Congressional policy behind ERISA and the LMRA.

The Second Circuit recognized, as this Court has, that ERISA and the LMRA equal representation rule are complementary, not conflicting. Both apply harmoniously to union pension and welfare funds covered by ERISA. See NLRB v. Amax Coal Co., 453 U.S. 322 (1981).

ERISA and the LMRA equal representation rule together create "the atmosphere" in which union pension and wel-

fare fund trustees must operate. NLRB v. Amax Coal Co., supra, 453 U.S. at 336. ERISA creates a closely knit enforcement scheme which precludes the expansion of standing or remedies by inference. See Massachusetts Mutual Life Ins. Co. v. Russell, ___ U.S. ___, 87 L.Ed.2d 96, 106-07 (1985). ERISA certainly did not repeal the LMRA equal representation rule by inference. Id.

LMRA Section 302(c)(5) commands the inclusion of its equal representation rule in every union pension or benefit fund agreement as a condition of its existence. 29 U.S.C. § 186(c)(5); NLRB v. Amax Coal Co., supra, 453 U.S. at 325, 328-33.

The LMRA equal representation rule is meant to insure that union trustees cannot use their power as trustees to

advance a union agenda, cannot use a fund "as a union 'war chest'", and cannot use their trust power to force contributions not required by the governing collective bargaining agreement. NLRB v. Amax Coal Co., supra, 453 U.S. at 328, 336.

Trustees must act "in accordance with" their trust and collective bargaining agreements, as long as these agreements are "consistent" with ERISA. See ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D); Iron Workers Local No. 272 v. Bowen, 624 F.2d 1255, 1259, 1261 n.9 (5th Cir. 1980) ("Ironworkers I").

This Court has recognized that Congress intended the LMRA equal representation rule to continue to govern union pension and welfare funds under

ERISA.[5] NLRB v. Amax Coal Co., supra, 453 U.S. at 336-38; Central States Pension Fund v. Central Transport, Inc., 472 U.S. ____, 86 L.Ed.2d 447, 452 (1985); Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 88 (1982) (ERISA Section 515 does not repeal antitrust or labor laws); cf. ERISA § 514(d), 29 U.S.C. § 1144(d).

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[5] The 1980 ERISA amendments grant individual trustees no additional powers. The new sections (29 U.S.C. §§ 1145 and 1132(g)(2)) were merely intended to induce employers who owe contributions to benefit funds to make those payments promptly. See, e.g., discussion of legislative history in Central States, Southeast & Southwest Areas Pension Fund v. Alco Express Co., 522 F. Supp. 919, 926-28 (E.D. Mich. 1981); cf. Central States Pension Fund v. Central Transport, Inc., 472 U.S. ____, 86 L.Ed.2d 447, 459 n.16 (1985); Morse v. New York State Teamsters Conference Pension & Retirement Fund, 580 F. Supp. 180, 187 (W.D.N.Y. 1983), aff'd per curiam sub nom. Building Trades v. New York State Teamsters Conference, 761 F.2d 115 (2d Cir. 1985). Standing remains as defined by ERISA § 502(a), 29 U.S.C. § 1132(a), the standing provision of ERISA. See Massachusetts Mutual Life Ins. Co. v. Russell, supra, 87 L.Ed.2d at 106.

Thus ERISA, consistent with the LMRA, defines trustees' powers by the terms of the trust agreements (including the LMRA-required equal representation rule), the common law of trusts, and the express provisions of ERISA itself. See Central States Pension Fund v. Central Transport, Inc., supra, 472 U.S. at ____, 86 L.Ed.2d at 454, 456, 458-59, 465; Ironworkers Local No. 272 v. Bowen, 695 F.2d 531 (11th Cir. 1983) ("Ironworkers II"); Morse v. New York State Teamsters Conference Pension & Retirement Fund, 580 F. Supp. 180, 186 (W.D.N.Y. 1983), aff'd per curiam sub nom. Building Trades v. New York State Teamsters Conference, 761 F.2d 115 (2d Cir. 1985).

As required by the LMRA equal representation rule, the Local 1974

Funds' trust agreements reserve the power to sue (as well as all other decisions) to a majority of the six trustees acting as a body, with deadlocks to be resolved by arbitration.[6] A 6-8. This is entirely consistent with ERISA.

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[6] Suit for employer contributions is an "administrative" trust function under LMRA Section 302 and thus requires a majority trustee vote or arbitration of a trustee deadlock. 29 U.S.C. § 186(c)(5). See NLRB v. Amax Coal Co., supra, 453 U.S. at 336-38; Ironworkers II, supra; Rosenthal v. Ann Service Corp., 571 F. Supp. 1229, 1232-33 (S.D.N.Y. 1983). Any power given to the trustees by the trust instrument is an "administrative" power. Barrett v. Miller, 276 F.2d 429 (2d Cir. 1960); Mahoney v. Fisher, 277 F.2d 5 (2d Cir. 1960); Singleton v. Abramson, 336 F. Supp. 754 (S.D.N.Y. 1971); see also Hawkins v. Bennett, 704 F.2d 1157, 1160 (9th Cir. 1983). Plaintiffs' suggestion that the decision to initiate a lawsuit is inherently inarbitrable and that a dispute over whether to sue is not cognizable under ERISA directly contradicts the holdings in Ironworkers I and II and conflicts with the rationale of Struble v. New Jersey Brewery Employees' Welfare Trust Fund, supra, 732 F.2d at 335. Plaintiffs' reliance on Farmer v. Fisher, 586 F.2d 1226 (8th Cir. 1978), overruled en banc, Robbins v. Prosser's Moving and Storage Co., 700 F.2d 433 (8th Cir. 1983), aff'd sub nom. Schneider Mov-

(Footnote continued)

Nothing in ERISA guarantees any individual trustee the power to sue or take any other unilateral action. ERISA Sections 402, 403 and 405 expressly authorize joint control of trust affairs and restrict individual trustees' duties and powers accordingly. 29 U.S.C. §§ 1102(a), 1103(a), 1105(b).

Only a "fiduciary" can sue to collect allegedly delinquent contributions.[7] And, by definition, one is a

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(Footnote 6 continued from previous page)
ing & Storage Co. v. Robbins, 466 U.S. 364 (1984) is misplaced. Farmer was not a suit under ERISA, did not mention ERISA, and did not hold that suit is not a matter of "trust administration." It addressed the question of whether, under the specific terms of the agreements at issue, a given dispute "arose from" the trust agreement or from the collective bargaining agreement, not whether the decision to sue involved "administration."

[7] See ERISA § 502(g)(2), 29 U.S.C. § 1132(g)(2) (contemplating only suits brought by a "fiduciary for or on behalf of a plan"); ERISA § 515, 29 U.S.C. § 1145 (contributions due "in
(Footnote continued)

"fiduciary" under ERISA only if, and "to the extent" that, one has discretionary control and authority granted by ERISA-consistent trust instruments. ERISA § 3(21)(a), 29 U.S.C. § 1002 (21)(a); Thornton v. Evans, 692 F.2d 1064, 1077, 1079 n.35 (7th Cir. 1982).

Since fiduciary status under ERISA is determined by the trust agreement, where, as here, a trust agreement reserves the discretionary power to sue, and thus the "fiduciary" duty and power to sue, to a majority of the "Employer Trustees and the Union Trustees collectively," individual trustees -- union or management -- do not have individual standing to sue as "a fiduciary."

(Footnote 7 continued from previous page)
accordance with" the terms of the applicable trust and collective bargaining agreements).

The court below was correct in so ruling. A contrary ruling would have permitted the union trustees to misuse the Local 1974 Funds and ERISA to pursue the union's own jurisdictional agenda.

Trustees cannot use ERISA to "advance union goals" in "an effort . . . to expand plan coverage beyond the class defined in the plan's terms," or to engage in other activities "unrelated to legitimate plan concerns." Central States Pension Fund v. Central Transport, Inc., supra, 472 U.S. at ____, 86 L.Ed.2d at 458 n.12.

That is exactly what is afoot here. The Local 1974 union-trustees' ERISA suit is an obvious effort to advance Local 1974's position in its persistent

jurisdictional dispute with Local 530 by imposing significant litigation expenses and exposure on employers who use Local 530 members.

The decision below stopped this abuse of ERISA -- correctly.

Any other decision would have lain the

> "groundwork for lawsuits by any one trustee, at any time, to advance what is believed to be the best interests of the trust. This would expose funding employers, the body of trustees, and the trusts themselves to the risk of inconsistent obligations and uncertainties -- precisely the type of evil that [the LMRA], the trust agreements, and ERISA itself aim to eliminate."

Rosenthal v. Ann Service Corp., 571 F. Supp. 1229, 1232-33 (S.D.N.Y. 1983).

The court below was also correct in holding that the union's proposed intervenor, Jones, lacks derivative standing.

The union trustees (and the union) cannot avoid the LMRA equal representation rule and pursue the union jurisdictional agenda under color of ERISA litigation by the ruse of joining a union member as a derivative plaintiff. That would, indeed, thwart the Congressional mandate. It would, in fact, effectively repeal the LMRA equal representation rule.

> "We note that the Taft-Hartley safeguard would be an ineffective tool if a trustee and participant in a fund could avoid the strictures on individual action imposed by Taft-Hartley § 302 by suing in the guise of a 'participant.'"

Rosenthal v. Ann Service Corp., supra, 571 F. Supp. at 1233.

There is no perversion of Congressional policy in the decision below.

2. The decision below is consistent with the decisions of the other circuits.

The Second Circuit faced the issue of whether the union trustees, acting alone, could sue to enforce their perception of an alleged contractual right to contributions without first exhausting the LMRA-prescribed arbitration of the trustees' deadlock on the preliminary question of whether to sue.

Neither Barrowclough v. Kidder, Peabody & Co., Inc., 752 F.2d 923 (3d Cir. 1985); nor Amaro v. Continental Can Co., 724 F.2d 747 (9th Cir. 1984); nor Struble v. New Jersey Brewery Employees' Welfare Trust Fund, supra, dealt with this issue.

Barrowclough and Amaro hold that statutory remedies to enforce statutory (not contract) rights cannot be denied through reference to collective bargaining arbitration of the merits of the claim. Burke v. Latrobe Steel Co., 775 F.2d 88, 90-91 (3d Cir. 1985); see also Zipf v. American Telephone & Telegraph Co., No. 85-3420, slip op. (3d Cir. August 27, 1986).

But, under ERISA, "claims seeking to enforce the terms of a pension plan . . . are subject to a contractually required arbitration process." Id.; see also Barrowclough, supra, 752 F.2d at 939.

There is no purely statutory right at issue here. Employer contribution obligations are defined by trust agreements and collective bargaining agree-

ments, not by the statute. ERISA imposes no independent statutory obligation to contribute.

ERISA's purpose is only "to protect contractually defined benefits." Massachusetts Mutual Life Ins. Co. v. Russell, supra, 87 L.Ed.2d at 107. ERISA only requires employers to contribute "in accordance with" the terms and conditions of the trust and collective bargaining agreements. Any obligation derives from the agreement not the statute. See ERISA § 515, 29 U.S.C. § 1145.

The union trustees propose to use ERISA to enforce their own view of terms of the collective bargaining agreement. They say it requires contributions to the Local 1974 Funds whether work is done by Local 530 members or by Local 1974 members.

The ultimate resolution of the jurisdictional dispute which drives this suit lies in the normal labor arbitral process, not ERISA. See, e.g., Drywall Tapers & Pointers of Greater New York, Local 1974 v. Operative Plasterer's & Cement Mason's International Association, supra, 601 F.2d at 677-78. No overriding policy permits ERISA litigation merely because employee benefits may be incidentally affected by the outcome. Viggiano v. Shenango China Division of Anchor Hocking Corp., 750 F.2d 276, 279-81 (3d Cir. 1984).

Barrowclough would agree:

> "We conclude the most reasonable accommodation is to hold that claims to establish or enforce rights to benefits under 29 U.S.C. § 1132(a) that are independent of claims based on violations of the substantive provisions of ERISA are

> subject to arbitration, [citing Viggiano], while claims of statutory violations can be brought in a federal court notwithstanding an agreement to arbitrate. [Citing Amaro.] Under the distinction we make between statutory and contractual claims, ERISA neither completely supplants nor is completely subordinate to arbitration."

Barrowclough v. Kidder, Peabody & Co., Inc., supra, 752 F.2d at 939 (footnote and other citations omitted).

This suit is grounded in the union's own view of the requirements of the collective bargaining agreement. The union trustees and the Local 1974 Funds have no greater rights than these agreements give them. The case is spawned by the agreements and the union's juridictional agenda, not the statute. There is no conflict with

Amaro or Barrowclough. Burke v. Latrobe Steel Co., supra.

The decision below also squares with the ERISA holdings of the Third Circuit in Struble and later cases, and with the LMRA holding in Nedd v. United Mine Workers of America, 556 F.2d 190 (3d Cir. 1977), cert. denied, 434 U.S. 1013 (1978).

Struble and Nedd concern the propriety of derivative actions against employers, but not the interaction between the LMRA equal representation rule and ERISA.

Nedd permits derivative litigation under the LMRA only where the trustees have "wrongfully" failed to sue. Struble permits a suit against trustees and -- after the establishment of fiduciary breach -- a derivative suit

against employers to recover any benefits obtained as a direct result of the trustees' proven self dealing. McMahon v. McDowell, 794 F.2d 100, 109 (3d Cir. 1986).

Neither the union trustees nor their proposed intervenor, Jones, has proven the sort of trustee defalcation required by the Third Circuit to establish ERISA derivative standing against employers.[8]

A trustee's failure to sue or to agree to sue is not itself a fiduciary breach. See McMahon v. McDowell, supra, 794 F.2d at 110; Ironworkers II, supra,

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[8] The Petition For a Writ of Certiorari does not challenge the Second Circuit's ruling that proposed intervenor Jones was properly denied both standing under the LMRA and standing to pursue a direct action under ERISA. Therefore, those points are not addressed here.

695 F.2d at 536; Challenger v. Local Union No. 1 of the International Bridge, Structural and Ornamental Iron Workers, 619 F.2d 645, 649 (7th Cir. 1980) ("Challenger").

Here, the employer trustees have done nothing more than refuse to join the union trustees in their ERISA-colored jurisdictional attack on Local 530 -- an attack that is, itself, an improper use of a trust office and, thus, a fiduciary breach.

The union trustees cannot use their office to "require employer contributions not required by the original collectively bargained contract. . . ." NLRB v. Amax Coal Co., supra, 453 U.S.

at 336 (quoting Arroyo v. United States, 359 U.S. 419 (1959)).[9]

They cannot use ERISA to advance the union's jurisdictional agenda. Central States Pension Fund v. Central Transport Inc, supra, 472 U.S. at ___, 86 L.Ed. 2d at 458 n.12.

The refusal to join the union adventure, hardly wrongful, is insufficient to support a derivative suit under Nedd, Struble, or McMahon. A charge of difference of opinion in construing an agreement is not a charge of fiduciary breach. See McMahon v. McDowell, supra, 794 F.2d at 108-110; Ironworkers II,

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[9] Cf. Kaiser Steel Corp. v. Mullins, supra, 455 U.S. at 84 (discussing the National Labor Relations Act Section 8(e) and noting that the "touchstone" is "protection of neutral employers . . . caught in the middle of a union's dispute with a third party").

supra, 695 F.2d at 536; Challenger, supra, 619 F.2d at 649.

No circuit has ruled that ERISA impliedly repeals the LMRA equal representation rule. None has ruled that the LMRA equal representation rule can be avoided by derivative litigation by union members.

There is no conflict with the decision below.

Conclusion.

The employer defendants were not charged with employing Local 1974 members while failing to make contributions to their benefit funds. There is no claim that the employers hired non-union workers. The charge is that the employment of Local 530 employees entitles the Local 1974 Funds to benefit contribu-

tions based on the work done by the Local 530 members.

This is a jurisdictional dispute, not an ERISA collection action. However, the union trustees have not complied with the trust instruments, ERISA, or the LMRA. They have no standing. Their proposed intervenor has not cured this deficiency.

This case has nothing to do with ERISA. It was correctly decided below in harmony with Congressional intent and the decisions of other circuits.

There is no occasion for a writ of certiorari.

Dated: New York, New York
October 8, 1986

Respectfully submitted,

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Statutory Appendix.

29 U.S.C. § 186. Restrictions on financial transactions

(c) Exceptions

(5) [With] respect to money or other thing of value paid to a trust fund . . .: Provided, That

(A) such payments are held in trust . . .;

(B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of

their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office. . . .

29 U.S.C. § 1002. Definitions

For purposes of this subchapter:

* * *

(21)(A) [A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority

or discretionary responsibility in the administration of such plan. . . .

29 U.S.C. § 1102. Establishment of plan

(a) Named fiduciaries

(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan. . . .

29 U.S.C. § 1103. Establishment of trust

(a) Benefit plan assets to be held in trust; authority of trustees

Except as provided in subsection (b) of this section, all assets of an employee benefit plan shall be held in trust by one or more trustees. Such trustee or trustees shall be either named in the

trust instrument or in the plan instrument described in section 1102(a) of this title or appointed by a person who is a named fiduciary, and upon acceptance of being named or appointed, the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan. . . .

29 U.S.C. § 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--

* * *

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

29 U.S.C. § 1105. Liability for breach of co-fiduciary

(b) Assets held by two or more trustees

(1) Except as otherwise provided in subsection (d) of this section and in section 1103(a)(1) and (2) of this title, if the assets of a plan are held by two or more trustees--

(A) each shall use reasonable care to prevent a co-trustee from committing a breach; and

(B) they shall jointly manage and control the assets of the plan. . . .

29 U.S.C. § 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought--

(1) by a participant or beneficiary --

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce

his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary

(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or

(B) to obtain other appropriate equitable relief

(i) to redress such violations or

(ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for approriate relief in the case of a violation of 1025(c) of this title;

* * *

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

* * *

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

* * *

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan --

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of --

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

29 U.S.C § 1144.

(d) Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of United States prohibited

Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

29 U.S.C. § 1145. Delinquent contributions

Every employer who is obligated to make contributions to a multi-employer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such plan or such agreement.